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No. 87-____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NATIONWIDE CORPORATION AND
NATIONWIDE MUTUAL INSURANCE COMPANY,
Petitioners,

v.

HOWING COMPANY AND
DOUGLAS McLELLAN,
Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DOUGLAS G. COLE
(Counsel of Record)
William R. Jacobs
STRAUSS & TROY
2100 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202-4186
(513) 621-2120
Counsel for Respondents
Howing Company and
Douglas McLellan

Dated: January 21, 1988

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

QUESTION PRESENTED

Whether the Sixth Circuit was correct in its determination that an implied cause of action exists under Section 13(e)(1) of the Securities Exchange Act of 1934.

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Respondents Howing Company and Douglas McLellan respectfully request that the Court deny the issuance of a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Sixth Circuit, entered on August 7, 1987.

JURISDICTION TO REVIEW IN THIS COURT

Petitioners allege that jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 13(e)(1) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(e)(1) (1982), enacted in Section 2 of the Williams Act, 82 Stat. 455 (1968), provides:

> It shall be unlawful for an issuer which has a class of equity securities registered pursuant to section 781 of this title, or which is a closed-end investment company registered under the Investment Company Act of 1940, to purchase any equity security issued by it if such purchase is in contravention of such rules and regulations as the Commission, in the public interest or for the protection of investors, may adopt
>
> (A) to define acts and practices which are fraudulent, deceptive, or manipulative, and
>
> (B) to prescribe means reasonably designed to prevent such acts and practices.
>
> Such rules and regulations may require such issuer to provide holders of equity securities of such class with such information relating to the reasons for such purchase, the source of funds, the number of shares to be purchased, the price to be paid for such securities, the method of purchase, and such additional information, as the Commission deems necessary or appropriate in the public interest or for the protection of investors, or which the Commission deems to be material to a determination whether such security should be sold.

REASONS FOR DENIAL OF THE WRIT

The decision of the United States Court of Appeals for the Sixth Circuit below is one of first impression.[1] There are no Circuit Court Appeals decisions that have ruled on the existence of an implied right of action under § 13(e) of the Securities and Exchange Act of 1934 (the "Exchange Act") which dictates the stringent obligations of an issuer in a "going private" transaction.

Petitioners Nationwide Corporation and Nationwide Mutual Insurance Company explicity acknowledge that the decision of the Sixth Circuit below "does not present a split between two appellate courts . . . ." (Writ, p. 21). Petitioners, however, argue that the Sixth Circuit has created a "broad assumption that virtually all federal statutes enacted between 1916 and 1975 include implied damages actions." Petitioners' interpretation of the decision below is as novel as it is specious. (Writ, pp. 9, 10). This case deals only with § 13(e) of the Exhange Act and any attempt to broaden the decision below to affect the interpretation of any other statute beyond the decision is simply a tortuous attempt to create a conflict where none exists.

Petitioner's singular argument is that the Sixth Circuit exercised faulty reasoning in finding an implied private cause of action under § 13(e) of the Exchange Act. Petitioners argue that the court below ignored the *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979) and *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979) decisions and expanded the *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979) decision. This does not create a conflict between Circuit Courts as to the result reached by the Court below.

Moreover, there is no reason to conclude that the decision of the Sixth Circuit was not correctly decided. The Court below, in deciding that a private right of action exists under

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[1] Citations are to the Appendix attached to the Petition for Writ of Certiorari.

§ 13(e) found that: (i) the statute is explicitly patterned after the statutes and regulations governing proxy solicitations which were enacted to protect shareholders from manipulation in tender offers and corporate repurchases of stock; (ii) the Court has recognized a similar private cause of action under the proxy regulations (§ 14(a) of the Exchange Act); (iii) Congress did not exclude a private cause of action under § 13(e); and (iv) the "contemporary legal context" supports the finding of a private right of action under § 13(e) of the Exchange Act. (10a-13a). The Petitioners simply disagree with the decision of the Sixth Circuit and have not satisfied the customary criteria for the Court to issue a discretionary writ of certiorari to review the decision below.

Likewise, Petitioners' reliance on the existence of conflicts between the decision below and selected district court decisions outside of the Sixth Circuit is misplaced. Such conflicts are better left to a resolution by the appropriate Circuit Courts of Appeals for the respective districts. Until such time, there is no conflict ripe for consideration by the United States Supreme Court. *See* 13 Moore's Federal Practice, ¶ 817.2 pp. SC 17-20, 21 (3rd Ed. 1985).

CONCLUSION

It is respectfully submitted that Petitioners have failed to sustain their burden of establishing that there are special and important reasons why the Writ of Certiorari should be granted. The decision below does not conflict with any decision of another Circuit Court, or of this Court. Since this decision correctly applies principles previously articulated by this Court, it does not involve any important question of federal law which has not been, but should be settled by this Court. Although this decision has potentially important business and economic ramifications, any review of this decision by this Court should await further development by other Circuit Courts of Appeals.

Petitioners have shown no reason why this Court should exercise its sound judicial discretion to entertain this case.

Respectfully submitted
DOUGLAS G. COLE
(Counsel of Record)
WILLIAM R. JACOBS
STRAUSS & TROY
2100 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202-4186
(513) 621-2120
Counsel for Respondents
Howing Company and
Douglas McLellan

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